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*Supplement*

No. 94-7743

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1994 TERM

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Fred A. Whitaker  
Petitioner,

vs.

Superior Court of California,  
San Francisco County  
Respondent,

Merrill Reese, Inc.  
Real party in interest

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA*

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**MOTION TO REQUIRE THAT FRED A. WHITAKER COMPLY WITH  
SUPREME COURT RULE 38(A) AND RULE 33  
BEFORE FILING ANY SUBSEQUENT PETITIONS FOR CERTIORARI**

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#### Introduction

Pursuant to the provisions of Supreme Court Rule 39.8, this Court has previously directed "the Clerk of the Court not to accept any further petitions for extraordinary writs from" Mr. Whitaker, unless he first files a docketing fee under Rule 38(a) and submits his papers in conformance with Rule 33. *In re Whitaker*, --- U.S. ---, 115 S.Ct. 2, 3 (1994). Because Mr. Whitaker was able to circumvent this order by labelling his present petition as one for certiorari (which it isn't), real party in interest Merrill Reese, Inc.<sup>1</sup> hereby requests that the

<sup>1</sup> Merrill Reese, Inc. is a duly organized California corporation, with no corporate parents or subsidiaries. (Supreme Court Rule 29.1.)

Court's prior order be extended to cover all petitions that Mr. Whitaker wishes to file -- whether or not they are labelled as extraordinary writs. Merrill Reese, Inc. also submits that Mr. Whitaker's application to proceed *in forma pauperis* in this proceeding should be denied.

#### Analysis

In both this Court, and in California's trial and appellate courts, Mr. Fred Whitaker has been recognized as a vexatious litigant. *In re Whitaker*, --- U.S. ---, 115 S.Ct. 2 (1994); *In re Whitaker*, 6 Cal.App.4th 54, 55 (1992). He has demonstrated an abusive and continuous practice of filing meritless petitions for purposes known only to him, thereby saddling his opponents with unnecessary costs. Supreme Court Rule 39.8 was enacted precisely to curb these abuses, and provides that:

If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis*.

By the decision in *in re Whitaker*, --- U.S. ---, 115 S.Ct. 2 (1994), this Court relied upon Rule 39.8, and Mr. Whitaker's pattern of frivolous petitions, in concluding that Mr. Whitaker should be precluded from proceeding *in forma pauperis*. The Court, however, limited its order to the type of petition that Mr. Whitaker had filed in that prior matter -- a petition for an extraordinary writ. Specifically, this Court noted that:

Although petitioner has exhibited frequent filing patterns with respect to petitions for writ of certiorari, we limit our sanctions at this time to the type of relief requested today--styled as petitions for extraordinary writs.

*Id.*, at 3. It is now time to extend the Court's sanction to all petitions that Mr. Whitaker desires to file.

Indeed, with his present petition, Mr. Whitaker has used the Court's circumspection as an escape hatch; for his present petition only nominally seeks a writ of certiorari. In fact, however, what Mr. Whitaker seeks is not available through a writ of certiorari, since the court proceedings below that he wishes to have reviewed are not yet final. Rather, the proceedings in the state court are ongoing, and no judgment has yet been entered. All that has occurred to rouse Mr. Whitaker's appellate protestations is that a trial judge did not recuse himself before ruling on a previously submitted motion. Instead, in accordance with California law, the judge first ruled on the pending matter, and then removed himself from the case. (See Petition for Certiorari at p. 6, item G; see also the Opposition of Merrill Reese, Inc. to Mr. Whitaker's petition, filed herewith.)

Through these events, no final judgment has been entered, for under California law, a litigant who claims he was denied due process by a judge's refusal to timely recuse himself may appeal his claim after judgment in the trial court is entered. *People v. Brown*, 6 Cal.4th 322, 332-334 (1993). That has not yet occurred. See also *United States v. State of Wash.*, 573 F.2d 1121 (9th Cir. 1978) (holding that a judge's refusal to recuse himself was not an appealable final order).

Indisputably, however, only the final judgments of state courts may be reviewed by certiorari:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C.A. §1257(a).

In fact, Mr. Whitaker apparently recognizes that his petition is not properly framed as a petition for a writ of certiorari, for in his petition he invokes this Court's jurisdiction not under 28 U.S.C.A. §1257(a), the provision governing writs of certiorari, but rather relies on the provisions of 28 U.S.C.A. § 1651, the All Writs Act. But the All Writs Act provides only for the issuance of the type of writs that Mr. Whitaker cannot file *in forma pauperis*: extraordinary writs. *See* vol. 9 *Moore's Federal Practice* (Matthew Bender 1994) ¶ 110.26, pp. 304-325.

In short, Mr. Whitaker has intentionally submitted a petition for an extraordinary writ under the guise of a petition for certiorari solely to escape this Court's prior sanction order. Such cynical manipulation should not be permitted, and real party in interest Merrill Reese, Inc. accordingly requests that the Court extend its prior ruling to preclude Mr. Whitaker from filing any petitions without abiding by Supreme Court Rule 38(a) and Rule 33.

#### Conclusion

Mr. Whitaker's application to proceed *in forma pauperis* in this proceeding should be denied, and the Clerk of the Court should be advised not to accept any further filings from Mr. Whitaker unless he complies with Supreme Court Rule 38(a) and Rule 33.

Respectfully submitted this 9th day of March, 1995.

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Case Number 94-7743

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#### PROOF OF SERVICE OF BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

#### PROOF OF SERVICE

Meri Gargano York certifies and declares as follows:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to this action; my business address is Four Embarcadero Center, Suite 1400, San Francisco, California 94111.

On March 9, 1995, I served the accompanying **BRIEF FOR THE REAL PARTY IN INTEREST MERRILL REESE, INC. SUBMITTED IN OPPOSITION TO PETITION FOR CERTIORARI** on each party to this proceeding by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Fred A. Whitaker  
872 - 69th Avenue  
Oakland, CA 94621

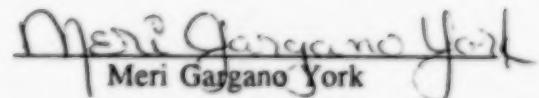
Honorable Judge Cahill  
San Francisco Superior Court  
633 Folsom Street  
San Francisco, CA 94107

Court of Appeal  
First Appellate District  
303 Second Street, South Tower  
San Francisco, CA 94107

Supreme Court  
303 Second Street, South Tower  
San Francisco, CA 94107

I placed said envelopes, by first-class mail, postage fully prepaid, in the United States mail at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 9, 1995.

  
Meri Gargano York

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